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Chantella Honeybee Sargon (P) v Ananda Dharmalingam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–500 OF 2003
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND NIK HASHIM JJCA
12 OCTOBER 2004

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Civil Procedure — Appeal — Appeal against judgment of High Court — Matter involving granting of custody of chidren — Whether subject to special rules

Family Law — Children — Custodianship — Appeal — Role of trial judge — Assessment of
C *witnesses — Whether any appealable error*

Family Law — Children — Custodianship — Appeal — Further evidence — Whether would result in miscarriage of justice

D The High Court had granted custody of the children of the marriage to the respondent. The appellant appealed. In opening the appeal, counsel for the appellant submitted that this being a custody appeal, it ought to be treated differently from other civil appeals. The appellant's counsel also moved for admission of further evidence.

E **Held**, dismissing the appeal:

(1) Appeals in custody cases, or in other cases concerning the welfare of children, were not subject to special rules. Even if the appellate court would itself have preferred a different conclusion, it must leave the
F decision of first instance undisturbed unless it could say that decision was wrong. The appellate court should only interfere when it was satisfied that the court of first instance had not merely reached a decision with which the appellate court might disagree, but had exceeded the generous ambit within which a reasonable disagreement was possible and had reached a decision which was so plainly wrong that it must erred in the
G exercise of its discretion (see para 3); *G v G* [1985] FLR 894 followed.

(2) It appeared from the trial judge's judgment that she undertook and fulfilled the responsibility entrusted on her as the primary finder of fact and did make an assessment of the witnesses (see paras 4 and 5). Since
H the court was unable to detect any appealable error, the court must defer to the view of the trial judge on her perception of the evidence before her (see para 6).

(3) It would be a miscarriage of justice to permit further evidence to be adduced. The case in the court below was fought on a common ground.
I That ground was that both sides would rely on evidence emerging from the cross-examination of the experts. To have permitted the further evidence in question would have occasioned an injustice to the respondent

as he would have to fight a new case altogether. And one upon which the court would have singularly lacked the views of the trial judge (see para 9).

[**Bahasa Malaysia summary**

Mahkamah Tinggi memberikan hak penjagaan anak-anak hasil dari perkahwinan kepada responden. Perayu merayu. Semasa pembukaan rayuan, peguam perayu menghujahkan bahawa ini adalah satu rayuan hak penjagaan, ianya berlainan dari rayuan sivil yang lain. Peguam perayu juga memohon untuk mengemukakan keterangan lanjutan.

Diputuskan, menolak rayuan tersebut:

(1) Rayuan-rayuan di dalam kes-kes hak penjagaan, atau di dalam kes-kes lain yang berkenaan dengan hal kebajikan kanak-kanak, tidak tertakluk kepada kaedah-kaedah istimewa. Walaupun mahkamah rayuan sendirinya lebih menyukai keputusan yang lain, ianya mesti tidak mengganggu keputusan mahkamah bicara melainkan jika ia dapat mengatakan yang keputusan tersebut adalah salah. Mahkamah rayuan hanya wajar mengganggu apabila ia berpuas hati yang mahkamah bicara tidak hanya mencapai keputusan yang mana mungkin tidak dipersetujui oleh mahkamah rayuan, tetapi telah melampaui had ketidaksetujuan yang munasabah dan telah membuat keputusan yang dengan jelasnya salah yang mana ianya hanya dapat dicapai jika ia silap dalam menggunakan budi bicaranya (lihat perenggan 3); *G v G* [1985] FLR 894 diikut.

(2) Dari penghakiman hakim bicara, ianya tampak yang beliau telah mengambil dan memenuhi tanggungjawab yang diberikan kepadanya sebagai pencari primer fakta dan telah membuat penilaian saksi-saksi (lihat perenggan 4 dan 5). Oleh kerana mahkamah tidak dapat menjumpai sebarang kesilapan yang boleh dirayu, mahkamah mestilah menghormati pendapat hakim bicara berkenaan persepsinya terhadap keterangan yang dikemukakan di hadapannya (lihat perenggan 6).

(3) Ianya akan menjadi satu salah laksana keadilan untuk membenarkan keterangan lanjut dikemukakan. Kes ini telah dibahaskan pada titik persamaan di mahkamah bawah. Titik persamaan itu adalah kedua-dua pihak bergantung kepada keterangan yang keluar dari pemeriksaan balas pakar-pakar. Untuk membenarkan keterangan lanjut akan menimbulkan ketidakadilan kepada responden kerana beliau terpaksa menentang kes yang baru sama sekali. Dan yang mana mahkamah secara sendirinya kekurangan pandangan hakim bicara (lihat perenggan 9).]

Notes

For cases on custodianship of children, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.

A **Cases referred to**

Clarke v Edinburgh Tramways Co (1919) SC (HL) 35 (refd)
G v G [1985] FLR 894 (folld)

Chew Swee Yoke (Walter Pereira with her) (Kamarudin & Partners) for the appellant.
B *Foo Yet Ngo (Faridah bte Abdullah with her) (YN Foo & Partners) for the respondent.*

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

C **[2]** The appeal is directed against the order of the learned judge in the court below granting custody of the children of the marriage to the respondent. A sustained argument was addressed by counsel for the appellant that the learned judge who heard the application had misdirected herself. It was also argued that the learned judge had not judicially appreciated the evidence and
D we were invited to set aside the order made in the court below.

[3] In opening the appeal, counsel for the appellant submitted that this being a custody appeal, it ought to be treated differently from other civil appeals. With respect, we must reject this submission. In the case of *G v G* [1985] FLR 894 the House of Lords held that a custody appeal was no different from
E other appeals. Suffice that we quote from the headnote at p 894 of the report:

> Held:
>
> (1) Appeals in custody cases, or in other cases concerning the welfare of children, were not subject to special rules. Even if the appellate court would itself have
F preferred a different conclusion, it must leave the decision of first instance undisturbed unless it could say that decision was wrong. The limited role of the appellate court in custody cases was not that appeals in such cases were subject to any special rules, but that there were often two or more possible decisions any one of which the court of first instance might reach without being held to be wrong. The appellate court should only interfere when it was
G satisfied that the court of first instance had not merely reached a decision with which the appellate court might disagree, but had exceeded the generous ambit within which a reasonable disagreement was possible and had reached a decision which was so plainly wrong that it must erred in the exercise of its discretion. Where the decision of the court of first instance, not being dependent on an assessment of witnesses, was vitiated by an error in the balancing exercise, being an erroneous weighing of the relevant factors, the appellate
H court could interfere.

[4] We have considered the arguments advanced before us on the appellant's behalf but we feel compelled to reject them. It appears from the learned judge's judgment that she undertook and fulfilled the responsibility entrusted on her as the primary finder of fact. At p 21 of her judgment, she says this:
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> After comparing their evidence as against the evidence of the three senior psychiatrists (two of whom had seen the respondent wife over a period of time) called by the

petitioner husband, in particular the court witness, Dr Chin, I am satisfied that Dr Chin's evidence remains the most accurate and reliable diagnosis that the respondent suffers the mental illness of major depression (with or without melancholia). It is also in evidence that even without melancholia the illness of major depression is a severe form of depression (as opposed to minor depression) and should not be treated lightly for if left untreated, it can result in serious consequences. In the circumstances, I am of the strong view that the respondent wife is not a fit and proper person to have custody of the children more so when they are children with special needs.

[5] The foregoing passage makes clear that the learned judge did make an assessment of the witnesses. It has often been said that as an appellate court our role is a limited one. The limits within which we are required to act are so well set out in *Clarke v Edinburgh Tramways Co* (1919) SC (HL) 35 at p 36 that we can scarce do better than quote what was said by Lord Shaw in that case:

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expression, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[6] Since we are unable to detect any appealable error, we must defer to the view of the learned judge on her perception of the evidence before her.

[7] The appellant is not without remedy. We make this comment in response to the arguments before us that the learned judge ignored the current mental status of the appellant. It was her finding that the appellant was psychologically unfit to look after the children. Based on those passages in the evidence drawn to our attention by both counsel we are satisfied that the judge took into account the appellant's current status when she evaluated the respective witnesses.

[8] As we have said, the appellant is not without remedy in respect of her current status. There are other courses open to her. However, we find ourselves unable to exercise our appellate powers to intervene in this appeal.

[9] There is one other matter that we need to deal with. At the commencement of the appeal, the appellant's counsel moved for admission of further evidence. We rejected this with no order as to costs. In our view, it would be a miscarriage of justice to permit further evidence to be adduced. The case in the court below was fought on a common ground. That ground was that both sides would rely on evidence emerging from the cross-examination of the experts. To have permitted the further evidence in question would have occasioned an injustice to the respondent as he would have to fight a new case altogether. And one upon which we would have singularly lacked the views of the trial judge.

[10] Having come to the conclusion that this appeal has no merits, we must dismiss it. By consent, there will be no order as to costs. The deposit is to be refunded to the appellant.

Appeal dismissed.

Reported by Loo Lai Mee